

United States Consumer Product Safety Commission
16 CFR Chapter II

COMMENT OF WILLIAM R. ALLEN REGARDING THE
ADVANCE NOTICE OF PROPOSED RULEMAKING
TO MANDATE A SAFETY STANDARD FOR BUNK BEDS

This comment will address the proposal by the Consumer Product Safety Commission (CPSC) to initiate a rulemaking proceeding that could result in a rule mandating bunk bed performance requirements to reduce the entrapment hazard to children. Advance Notice of Proposed Rulemaking, 63 Fed. Reg. 3280 (1998) (hereinafter ANPR). Most bunk bed manufacturers conform to a voluntary standard that addresses entrapment. However, the number of entrapment fatalities in children under the age of four has not dropped since the standard was implemented. According to the CPSC, furniture manufacturers have not displayed “sufficient compliance with the voluntary standard to reduce the products risk to the point that the risk [of death to children] is no longer ‘unreasonable’.” ANPR at 3284 (relying upon language in H.R. Conf. Rep. No. 97-208, at 873 (1981)). The CPSC finds that an unabated “unreasonable” risk exists due to the severity of the injuries and the vulnerability of the injured population. Id. at 3284. The primary objective of the proposed rulemaking is to publish a mandatory entrapment standard that would increase manufacturer compliance. Id, at 3283. As a result, the CPSC believes that a mandatory entrapment standard would reduce or eliminate the risk of injury or death from entrapment.

I believe that bunk bed manufacturers are adequately complying with the current voluntary standard. Reliance upon a mandatory standard will not significantly increase manufacturer

compliance. Continued conformance to the voluntary standard will eventually reduce entrapment fatalities. I believe that the CPSC is hastily initiating the proposed rulemaking and makes factual findings that are generally unsupported by the available information. The CPSC should terminate the current rulemaking and publically rely on the existing voluntary standard.

Congress delegated broad authority to the CPSC to regulate unreasonable risks of injury associated with consumer product hazards. 15 U.S.C. § 205 1. To safeguard consumers from deficient industry self-regulation, the CPSC has interpreted this grant as authority to promulgate mandatory safety standards. 16 C.F.R. § 103 1.2(a). However, Congress restricted agency deference. The CPSC should defer to a voluntary standard for consumer product safety if “compliance with such voluntary standards would eliminate or adequately reduce the risk of the addressed injury and it is likely that there will be substantial compliance with such voluntary standards.” 15 U.S.C. § 2056(b) (*italics added*). In the instant rulemaking, the CPSC finds a lack of substantial compliance with a voluntary standard. ANPR at 3284.

Helped by the CPSC, the major manufacturers of bunk beds developed a voluntary standard that ASTM published as a national consensus standard in October 1992. ANPR at 328 1. Children can become entrapped between the bed and wall, under a guardrail, or in the bed’s end structures. *Id.* At 3282. To prevent entrapment, the standard prescribes two guardrails on the upper bunk, recommends proper mattress size, and restricts any opening in the frame to a width of less than 3.5 inches. Options Package for Bunk Beds, Attachment A. The voluntary standard also warns that a child under the age of six should not be placed in the upper bunk. Bunk bed manufacturers implemented the formulated standard with a certification program. For its efforts in developing the voluntary standard, the American Furniture Manufacturers Association received

the CPSC Chairman's Commendation for Significant Contributions to Product Safety in 1996.

CPSC Press Release # 96-126.

The CPSC concedes that the voluntary entrapment standard adequately addresses the "most common" entrapment hazards posed to young children by bunk beds. ANPR at 3283. However, entrapment deaths continue to occur as parents and other caregivers disregard warnings by placing children under the age of six into top bunks. In fact, 96 percent of all fatalities due to entrapment were among children under the age of four. Options Package for Bunk Beds, Attachment B at 2. The CPSC seeks to mandate an entrapment standard to compensate for consumer misuse.

The CPSC interprets the incident data for entrapment fatalities to find that the voluntary standard is ineffective in removing the hazard from the marketplace. However, the CPSC cannot factually support the imposition of a mandatory standard. First, information on the date of manufacture and source of the lethal bunk beds does not necessarily indicate a continued noncompliance by furniture manufacturers. Of fifty-four entrapment deaths, only four lethal bunk beds were manufactured after the publication of the voluntary entrapment standard in 1992. Options Package for Bunk Beds, Attachment B at 7. A date of manufacture was unavailable for thirty-seven of the lethal bunk beds. Id. "At least" six of the fifty-four lethal bunk beds were homemade. Id. This evidence fails to establish a link between nonconformance with the voluntary standard and the unchanged incidence of entrapment death.

Second, the incident data do not support or refute the efficacy of the voluntary entrapment standard. ANPR at 328 1. The annual number of entrapment deaths has not declined since the publication of the voluntary standard. Id. During the five-year period covered by the incident

data, the total number of nonconforming bunk beds removed from consumer use could have reached 50 percent.¹ Due to poor statistics, the CPSC could not reliably discern a trend in the incident data. Options Package for Bunk Beds, Attachment B at 7. Without an understanding of this unaltered death rate, noncompliance cannot be associated with the continuing incidence of entrapment fatalities. In the future, the retirement of nonconforming bunk beds should concomitantly reduce the annual number of entrapment deaths.

To overcome these weaknesses in their data and findings, the CPSC generally contends that some bunk bed manufacturers either lack a sense of urgency to comply with a voluntary standard or are unaware of the hazards associated with noncompliance. ANPR at 3283. Contrary evidence exists. All 106 manufacturers identified by the CPSC currently comply with the voluntary entrapment standard. *Id.* The voluntary entrapment standard has elevated industry compliance to a level of “possibly 90 percent or more.” *Id.* at 3284. Recalls of nonconforming bunk beds have dropped. Only 19,600 of the 531,000 total recalls of nonconforming bunk beds have occurred since November 1996. Options Package for Bunk Beds, Attachment E at 7. No manufacturer, distributor or importer of bunk beds has incurred more than one recall. *Id.* The CPSC barely justifies the general finding of a lack of awareness and urgency with anecdotal evidence obtained from manufacturer contacts. ANPR at 3283. Since they were presumably

¹ Since 1993, potentially 200,000 nonconforming bunk beds per year have exceeded their expected useful life and cycled out of use. The CPSC has recalled 531,000 nonconforming bunk beds. Assuming complete removal effectiveness, the number of nonconforming bunk beds was reduced from approximately 3.0 million to approximately 1.5 million between January 1993 and September 1997. As simplifying assumptions for the calculation, values that were taken from the CPSC cost-benefit analysis include: 1) a 15 year expected useful life; 2) fixed annual production of 500,000 bunk beds produced annually; 3) a compliance rate of 90% from 1993-97; 75% from 1987-92; and 50% before 1986. (Options Package for Bunk Beds, Attachment D at 2-3).

among the 106 identified manufacturers, the contacted companies are nonetheless complying with the voluntary standard.

Since all identified manufacturers are compliant, the CPSC further finds that small regional manufacturers are responsible for “serious nonconformance problems with the voluntary standard.” ANPR at 3282-83. Due to the “ease of constructing bunk beds,” these small companies can “quickly go in and out of the business of making bunk beds” and defy identification by the CPSC. *Id.* at 3282. In a seemingly contradictory statement, the CPSC relates that these “small regional manufacturers or importers” are “not likely to account for a significant share of the U.S. market in bunk beds.” *Id.* However, the CPSC does not **quantify** the numerical contribution of small companies and **importers** to the pool of nonconforming bunk beds.

Akin to their larger brethren, the CPSC argues that these small regional companies are generally unaware of the voluntary standard and the hazards associated with nonconformance. However, this class of manufacturers may be incapable of regulation by any mandatory or voluntary standard. Small regional companies that temporarily sell bunk beds are probably seeking short-term profits and are not concerned with corporate longevity. An intentional noncompliance with a standard may reduce production costs. If a manufacturer has profited and purposely ceased operations, holding either the entity or its stakeholders accountable for producing faulty beds is more **difficult**. CPSC Chairperson Brown characterized large manufacturers as more reputable than these small regional makers. Statement of Honorable Ann Brown, January 14, 1998, Press Release # 98-057. Alternatively, a less-sophisticated small company could legitimately be ignorant of a standard governing bunk bed design. Whether their

behavior is intentional or merely negligent, temporary market participants may ignore any standard until caught.

Small regional manufacturers are not likely to be members of collective industry organizations, such as the American Furniture Manufacturers Association or an ASTM subcommittee. In a tenuous link, the CPSC equates association non-membership with a potential unawareness of the voluntary standard and a potential inability to interpret its requirements. ANPR at 3283. The contrary is **probably** true. A manufacturer that does not have an effective desire to follow a standard would probably not seek association membership. Merely mandating a standard would not give a disreputable small regional manufacturer any additional motivation.

One statutory duty of the CPSC is to discover manufacturers or importers who fail to comply with a standard or make a hazardous product. The promulgation of a mandatory standard will not substantially reduce the agency burden to catch offenders. Other entities also monitor compliance with the voluntary standard. States and localities have a responsibility to ensure the safety of their citizens. Consumers bear responsibility to be vigilant. Furniture manufacturers should want to protect customers that **fund** corporate coffers with retail purchases and securities purchases.

Bunk bed manufacturers of all sizes have ample financial incentive to comply with a merely voluntary standard. As a result of a product recall, a company bears the cost of repair, refund or replacement. State products liability law compensates victims injured by defective products and punishes offending manufacturers. A sympathetic jury can award large monetary damages. Since a manufacturer of a defective product is presumed negligent, the burden of proof is eased for any plaintiff. Strict liability and financial incentive to prevent sales of nonconforming

bunk beds, also extends to wholesalers, distributors and retailers. Children's deaths and law suits generate adverse publicity in the mass media. **High** profile actions by the CPSC include enforcement actions for failing to report product hazards, civil penalty settlements, product recalls, and industry-wide safety initiatives. Observant consumers can selectively remove noncompliant offenders from the marketplace by avoiding their products. Since the adverse publicity substantially affects the furniture manufacturing sector, makers of bunk beds have incentive to police their peers.

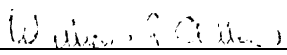
The CPSC wants to strengthen penalties for nonconformance. ANPR at 3283. As a regulatory alternative, the CPSC can terminate the present proceeding and publish notice in the Federal Register that it will rely on the existing voluntary standard to reduce or eliminate the risk of injury. U.S.C. § 2058(b)(2). If the CPSC relies upon the voluntary standard, a manufacturer would have a duty to report a noncompliance. U.S.C. § 2064(b)(1). Failure to report is a prohibited act. U.S.C. § 2068(a)(4). As a prohibited act, the CPSC can then assess civil penalties, seek criminal penalties, or enjoin or seize nonconforming products. U. S.C. §§ 2069-71. Criminal penalties can extend to individual corporate officers, directors, or agents. U.S.C. § 2070(b).

The current voluntary standard, if modified to extend the rails fully to both ends of beds, is likely to adequately reduce or eliminate the risk of entrapment. Labeling and instructions can warn consumers of the hazards of entrapment. Information and education campaigns can also serve to reduce the risk by increasing consumer awareness. Fatalities and injuries from falls and hangings may also be incidentally reduced.

In conclusion, the CPSC should not create a precedent by rejecting an arguably adequate voluntary standard. The rejection would not be based on flaws in the standard itself, but on weakly supported findings regarding industry noncompliance. The rejection would be a disincentive to voluntary standardization and self-regulation. In the future, a manufacturer or industry could hunker down and wait for the CPSC to redress a hazardous product. As a whole, consumer products could actually become more dangerous.

I believe that the proposal to mandate an entrapment standard for bunk beds is premature. If enhanced compliance were the only consideration, every standard would be mandatory rather than voluntary. Based on the present information, the voluntary standard is adequate to prevent common entrapment hazards. As nonconforming bunk beds continue to cycle out of use, the number of entrapment fatalities should drop. If the future incident data show that the manufacture of nonconforming beds is continuing, then the agency can easily initiate another rulemaking to mandate an entrapment standard.

Respectfully submitted,



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Consumer Product Safety Commission
63 FR 3280

Comment Regarding Proposed
Bunk Bed Standards

Introduction

The Consumer Product Safety Commission (CPSC) has requested comments on the safety of bunk beds. 63 F.R. 3280. This comment will focus on the sufficiency of the current voluntary industry standard set by the American Furniture Manufacturers Association (AFMA), and the lack of any benefit from changing this to a mandatory standard as proposed. I am a second year law student, and my only interest in bunk beds is as a possible future consumer. The first section of this comment will address the major manufacturers of bunk beds, and the industry standards already in place. The AFMA voluntary standard is sufficient because a substantial majority of manufacturers comply. While there has been an average of eight entrapment deaths per year, these deaths have occurred in beds that are not in compliance with the current voluntary standard. The second section will address the smaller manufacturers who are not a part of any industry organizations, and may or may not comply with the voluntary standards. The third section will address other steps that could be taken instead of a mandatory standard, or added to a voluntary standard. Attached are two reports that are referenced in the body of this comment.

I. Major Manufacturers

CPSC Chairman Ann Brown said "Here, the primary issue is not a matter of changing the quality or content of the voluntary standard. Instead, it is a matter of increasing conformance to the standard" (CPSC Release #98-057). But changing the current voluntary standard to a mandatory standard will not increase compliance. All 106 of the bunk bed manufacturers identified by CPSC, who produce at least 75% of the bunk beds, already comply with the voluntary standard. Whatever standard is adopted will not affect those bunk beds that have already been produced and sold to consumers.

There can obviously be no increase in compliance if the CPSC cannot find even a single manufacturer that makes bunk beds that do not comply with the current standard. Any changes that become necessary can be implemented just as easily through a voluntary standard. The AMFA was awarded the CPSC Chairman's Commendation for Significant Contributions to Product Safety in May of 1996, and has incorporated many changes suggested by the CPSC in the past (CPSC Release #96-126, May 16, 1996). There is no reason to think that in the future the AMFA will not be just as receptive to changes in their standard.

The proposed regulation mentions several possible benefits of changing to a mandatory standard. First, "A mandatory standard would allow the Commission to seek penalties for violations." This would presumably generate negative public opinion against that manufacturer and deter that and other manufacturers from making further non-complying beds. However, recalls have the same negative impact on manufacturers, as well as imposing a substantial financial burden. The sanction of civil penalties would not increase the penalties that manufacturers already face in producing a dangerous bed that is

recalled. Manufacturers can also face liability in tort for producing a bed that has a defective design. A wrongful death suit could generate a significant financial burden on manufacturers. There is already a substantial economic incentive to design and produce bunk beds that comply with the voluntary standards.

The CPSC projects that 10 entrapment deaths will occur per year, with the standard that is already in place. These ten deaths will presumably occur in beds that were produced before the current standard took effect. The proposal here is not for a new, safer standard, but only to make the current voluntary standard mandatory. But making the standard mandatory cannot increase compliance when all 106 manufacturers already make products that conform. There is no indication that the AFMA has been anything other than cooperative in making changes in their standard to ensure that bunk beds are safe. In the past, the CPSC has suggested changes, and the AFMA has made them. If the changes are to be made to the substance of the rule, then they can be just as easily made by the AFMA in their voluntary standards.

With two exceptions, the CPSC cannot issue a standard under either the CPSA or FHSA if the industry has adopted and implemented a voluntary standard that addresses the risk. If the Commission finds that compliance with the standard will not eliminate the risk, or it is unlikely that there will be substantial compliance, then the commission can issue a new standard. Chairman Brown has already stated that the content of the standard is not the problem. In fact, much of the current voluntary standard has been suggested by the CPSC itself. So for the Commission to issue a standard, it must find that there is not substantial compliance. Regardless of the legislative history, every manufacturer that the CPSC has located complies with the voluntary standard. Presumably, that level of

compliance is substantial, and there would be no possible way to increase compliance. A mandatory standard might provide for enforcement, but there will be no one to enforce it against.

The danger to children is not in the beds currently being produced, but in the beds that have been produced in the past that are not in compliance with the current regulation. There are currently 7 to 9 million bunk beds in residential use, and about 500,000 bunk beds are produced each year. In 14 to 18 years, the bunk bed market will replenish itself. A regulation implemented this year would have all beds in compliance by the year 2016. Changing the regulation to a mandatory one will not decrease the danger from the beds that are already in consumer's homes. And the current voluntary standard will get all beds in compliance in the same amount of time as a mandatory standard.

The CPSC already faces a tremendous workload. Changing the voluntary standard to mandatory would only increase the use of resources for regulating bunk beds, while not adding any real safety to the industry. The Commission's limited resources can best be used in other areas.

II. Small Manufacturers

The proposed regulation indicates that in addition to the major manufacturers discussed above, there are also several smaller operations that produce bunk beds. Start up costs are relatively inexpensive, and many smaller manufacturers go in and out of business. Many may not be aware of any industry standard, or even of the danger that bunk beds can present.

Also, many people produce bunk beds at home, using plans prepared by woodworking companies. There are at least two **internet** sites that offer plans and marketing instructions, so that anyone (even someone without woodworking experience, the ad claims) can make and sell bunk beds at a profit of \$300 a day. (<http://rrnet.com/bunkbeds/bunkbeds.html>). There is some activity in these plans, as Bunk Bed Bob's service was being discussed in the Usenet group *rec.woodworking*, and his Web page was listed by three different Internet employment services. There were also at least two companies with Web Pages offering to sell bunk beds plans for about five dollars each.

Obviously, many of these manufacturers and builders would be unaware of any standard, whether voluntary or mandatory. Just finding most of the manufacturers would be a difficult task. Civil penalties for non-compliance would have almost no deterrent effect because there would be no publicity. These small scale manufacturers would be held to the same standard of care as those who make hundreds of thousands more bunk beds. This would impose a much greater risk of civil liability for smaller manufacturers and make the cost of doing business almost prohibitive. A mandatory rule will not prevent these beds from being produced, but a warning requirement **on the** plans that are sold might at least alert some otherwise unknowing manufacturers to the presence of a standard and to some of the dangers present in bunk beds.

III. Alternatives to a Mandatory Rule

The CSPC has proposed a solution that does not fit the problem. As the proposed rule indicates, almost all of the deaths involved children under the age of four. The

problem is not with the design of the bunk beds, but rather misuse by the consumer.

Retailers of bunk beds could be required to inform prospective customers of the danger present to young children. Warning labels could also be required on the beds themselves. Steps should be taken to educate the public that bunk beds present very real dangers to children under the age of four.

Requiring manufacturers to put a label with their name and the model number should also be added to the voluntary standard. By requiring this information, the CPSC could alert consumers to dangerous bunk beds much easier. Recalls would reach a greater percentage of the affected consumers, because they would be able to tell if their bed was affected just by looking at the label.

A regulation could also be issued requiring any plans or kits sold to comply with the standard. The rule could specify that any plans, if properly followed, must produce a bed that is in compliance with the standard. The Devon County Council, of the United Kingdom, has a similar rule, which is attached to this comment. [Http://www.devon-cc.gov.uk/tradstds/notes/tsd25.html](http://www.devon-cc.gov.uk/tradstds/notes/tsd25.html). The Devon rule applies to manufacturers, sellers, second hand sellers, and sellers of plans. These other sources of bunk beds must be considered in deciding what standard to implement. As the Honorable Mary Sheila Gall stated in CPSC Release # 98-057, many of the deaths that occurred were in homemade or altered beds. By regulating the design of these beds and kits, many deaths could be eliminated.

The Chairman also asked for any other data relating to the deaths and injuries caused by bunk beds. The Monash University Accident Research Centre, located in Australia, studied injuries caused to children because of nursery furniture. Injuries

Associated with Nursery Furniture and Bunk Beds, Monash University Accident Research Centre - Report #123, <http://www.general.monash.edu.au/muarc/rptsum/es123.htm> (a copy is attached to this comment). This study reports that there were no bunk bed deaths in Victoria. However, the study estimates that there are at least 3,850 bunk bed injuries annually, with over half of these involving children age 5-9. The study also relied on data used by the CPSC. One of the recommendations was that "Australia/New Zealand should focus initially on improving its safety requirements for nursery furniture in-line with other major importers of nursery equipment, particularly the U.S." This indicates that foreign countries will likely comply with U. S. standards in order to do well in U.S. markets.

Conclusion

There is really no benefit to changing the voluntary AFMA standard to a mandatory one. There is already substantial compliance, in fact perfect compliance with the current standard. Merely changing it to mandatory cannot possibly increase the compliance rate. Instead of changing a standard that is already effective, the CPSC should look to areas where dangerous bunk beds are produced.

The smaller manufacturers and those who build bed from kits need to be made aware of the dangers present in bunk beds. A mandatory standard will not be any more effective at reaching these smaller manufacturers. The real problem, as identified by the Honorable Ms. Gall, is in homemade and altered beds. The makers of these beds will not have knowledge of any standard, voluntary or mandatory.

The CPSC should have the AFMA implement a policy, as part of their voluntary standard, to require manufacturers to place a label on beds with their name and the model

number. This would make recalls much more effective and greatly lessen the dangers that children face from bunk beds.

Because so many of the death occurred to children under four, consumers need to be educated about when to purchase a bunk bed. A warning label could also be required, notifying consumers that the beds can pose a danger to smaller children. **Safety** announcements and other efforts at public education will be much more effective at preventing deaths than implementing a mandatory standard.

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Injuries Associated with Nursery Furniture and Bunk Beds

Monash University Accident Research Centre - Report # 123

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Abstract:

This publication reports on research undertaken into the safety of nursery furniture to underpin a proposed injury reduction program for these products. It contains a review of recent Australian and international literature on nursery furniture and bunk bed safety providing an overview of the injury issues involved and a review of the relevant standards. Major sources of Australian and international data relevant to this area were identified and the available data summarised. An in-depth analysis of Victorian data was undertaken to identify the relevant nursery furniture: products, the nature and severity of injuries sustained and any patterns or trends including age profiles.

The major items of nursery furniture associated with injury, in the 0-4 year olds, in Australia are: prams, cots, high chairs, baby walkers, strollers, change tables and baby bouncers. Injury associated with nursery furniture is most likely to occur in the first year of life. Cots have the highest mortality with all identified deaths occurring as the result of asphyxia. In terms of non-fatal injury the picture is less clear with the incidence of injuries associated with different products varying between States. A comparison of hospital admission rates in Victoria for injuries related to the different products suggest that baby bouncers are associated with the most severe non-fatal injuries with almost one-third resulting in hospital admission. Falls were the most common cause of non-fatal injury in every product category with injuries to the face and head being the most prevalent. For at least four of the products (cots, prams, strollers and high chairs) about 6 percent of cases could be clearly identified as product failure (collapse, malfunction or entrapment hazard).

Victorian injury surveillance data shows that 86 percent of bunk bed related injuries in the under fifteen age group occur in children under the age of ten. While bunk-bed injuries peak in the 5-9 year age group, they still account for similar numbers of injuries as individual nursery products in the 0-4 year age group. No deaths related to bunk-beds could be identified in the available Australian data, however, information from the United States suggest that at least 38 children (mainly under 3 years) have died of asphyxia due to entrapment in the bunk structure, since 1990. The main cause of non-fatal injury is due to falls from the top bunk resulting in a fracture (33 percent), mainly to the upper extremity (75 percent).

On the basis of this research a number of recommendations have been made

regarding product standards, injury data collection, research and evaluation and the dissemination of information. In particular, it is recommended that standards be developed for baby walkers, high chairs and change tables, that mandation of standards in Australia should occur when voluntary standards and the market place are ineffective in achieving compliance and evidence warrants it and that there is sufficient evidence and lack of compliance to mandate standards for household and portable cots.

Executive Summary

Rationale

Certain items of nursery furniture have been identified as potentially hazardous to children under five years of age. Bunk beds have also been shown to pose risks to children under ten years. The Monash University Accident Research Centre (MUARC) was invited by the Consumer Affairs Division of the Department of Industry, Science and Tourism to provide information on the hazards associated with nursery furniture and bunk beds to underpin a proposal for an injury reduction program in this area.

Aim

To undertake research into the safety of nursery furniture and bunk beds to underpin a proposed injury reduction program for these products.

Specific objectives

1. Undertake a review of recent Australian and international literature on nursery furniture and bunk bed safety to:

- (a) identify the relevant nursery furniture products;
- (b) provide an overview of nursery furniture and bunk bed injury Issues;
- (c) review nursery furniture standards

2. Identify the major data sources and provide, to the extent possible, a summary of data available in Australia and internationally.

3. Undertake data analysis, to the extent possible (given the limitations of available data), including : nature of injuries and possible product involvement;

- * ranking of occurrence and severity of injury by product;
- * and identification of patterns and trends including age profiles.

SUMMARY OF FINDINGS

Nursery furniture

An analysis of injury surveillance data revealed that the major nursery furniture products associated with injury in Australia are : prams, cots, high chairs, baby walkers, strollers, change tables and baby exercisers (bouncers). While injuries in the under five age-group peak at around one to two years of age, injuries associated with nursery furniture are most likely to occur in the first year of life.

It is estimated that, in Australia, at least 6,540 injuries associated with nursery furniture (and treated in hospital Emergency Departments or by general practitioners) occur annually in the under five age group. Of these, it is estimated that at least 540 cases result in hospital admission. Over 3,500 of these cases are aged under one year and of these, at least 270 result in hospital admission.

The estimated injury rate of 508 per 100,000 population for all medically treated (Emergency Department and general practitioner treated) nursery furniture-related injuries in the under five age-group is not too dissimilar from the U.S. injury rate of 431 per 100,000 population which only applies to treatments in hospital Emergency Departments.

In terms of injury severity, cots have the highest mortality. Of the 13 nursery furniture-related deaths identified in Victoria between 1985 and 1994, 10 (over 75 percent) were associated with cots. This is consistent with U.S. figures which show that almost 70 percent of nursery furniture-related deaths, identified by the CPSC, were associated with cots. All but one of the deaths associated with cots in Victoria were due to asphyxia and involved entrapment hazards directly related to cot design or modification (6) or to the cot environment (2 accessed blind cords, 1 strangled on the elastic attached to a toy). The other death resulted from a fall from a cot, though the actual mechanism of death was again asphyxia, due to the child falling into a clothes basket and suffocating in the contents. Strollers, high chairs and change tables have also been implicated in at least one death each in Victoria since 1985.

In terms of non-fatal injury, the picture is less clear cut with the frequency of injuries associated with the different nursery products varying between States. Baby walkers, high chairs and strollers were the three nursery furniture products most frequently associated with injury

nationally while prams, cots and high chairs were most prominent in Victoria. A comparison between the national (NISPP) and Victorian (VISS) data sets suggests that this difference does not reflect demographic variations between the two collections. Rather, it may suggest different patterns of usage or changes over time since the collections represent different time periods. For example, the fall in baby walker injuries recorded by VISS over the period 1989-93 appears to coincide with a strong intervention program in Victoria to discourage the use of baby walkers. The proportion of baby walker injuries recorded in the new VEMD collection in 1996 (ranked sixth compared to fourth in VISS) suggests that such injuries are still declining in relation to injuries associated with other nursery furniture products.

A comparison of hospital admission rates in the Victorian collection for the different products suggest that baby exercisers or bouncers are associated with the most severe non-fatal injuries with almost one in three injuries resulting in hospital admission. This is due to the fact that falls from bouncers are usually from a height when care-givers place the bouncer on an elevated surface such as a bench-top. These are followed by high chairs and strollers both of which have admission rates equal to, or higher than, the overall admission rate for children under 5 years of age.

Falls were the most common cause of non-fatal injury in every product category (65 percent overall) ranging from 43 percent in the case of baby bouncers to 77.5 percent in the case of change tables. Injuries to the head and face were most prevalent in all product categories accounting for 63.5 percent overall (and up to 82 percent for stroller-related injuries). Injuries to the upper extremities were next at 15.3 percent of injuries recorded (and up to 22.3 percent for cots). Bruising, inflammation and/or swelling was the most common type of injury (31.3 percent), followed by lacerations (16.1 percent), concussion (11.2 percent) and fractures (8.3 percent).

For at least four of the nursery furniture products (cots, prams, strollers and high chairs) a small percentage of product failure was indicated as causal. For this group of products about 6 percent of cases could be clearly identified as product failure (collapse, malfunction or entrapment hazard). High chairs had the greatest percentage of identified product failure (8 percent) due mainly to the tray falling off allowing the baby to fall out. Seven percent of cot injuries were attributed to failure on the part of the product, mainly entrapment hazards. The main problem identified for prams and strollers was collapse of the product resulting in it folding up on the child. Almost half of identified malfunctions in prams involved the restraint breaking or coming undone.

Bunk beds

Injury surveillance data (VISS) shows that eighty-six percent of bunk bed-related injuries in children under fifteen years of age occur in children under ten years. While bunk bed injuries peak in the 5-9 year age group, they still account for similar numbers of injuries as individual nursery furniture products in the 0-4 year age-group,

It is estimated that, in Australia, there are at least 3,850 injuries annually, in the under fifteen age-group, associated with bunk beds, that are treated by hospital Emergency Departments or by general practitioners. Of these, it is estimated that about 390 cases result in hospital admission. Almost half of all bunk bed injury cases occur (1900) in the 5-9 year age group and, of these, at least 180 result in hospital admission.

No deaths associated with bunk beds have been identified in the Victorian data. However, the U.S. Consumer Product Safety Commission has identified 38 cases, since 1990, in which children (mainly aged under 3 years) have died of asphyxia due to entrapment in the bunk structure. Based on NEISS data, it was estimated that there were at least 17 bunk bed-related deaths in the U.S. in 1995.

The main cause of non-fatal injury associated with bunk beds is a fall from the top bunk (80 percent of cases). The most common activity associated with a fall is playing (32 percent of falls). Over half of these falls occur in the under five age group (55 percent), with about 40 percent in the 5-9 age group and only 4 percent in the K-14 year age-group. Jumping from bunks (7 percent of all injury) as a cause of injury also decreases with age. After playing, sleeping is the next most common activity associated with falls. The pattern is somewhat different in this instance with the majority of injuries (64 percent) occurring in the 5-9 year age-group, 19 percent in the 10-14 year age-group and the remainder (17 percent) in the under fives. One would expect that the lower involvement of under fives is due to the fact that they are less likely to sleep in a bunk bed. However, the high proportion of 5-9 year olds falling from bunks while sleeping suggests that children of this age may not be ready to sleep in a top bunk.

Because only 5 percent of narratives specified the presence or absence of a safety rail, little can be inferred about the usefulness of these in preventing falls. In at least 10 cases (1.6 percent), the injury can be directly attributed to a failure of the product or its design. Nine of these cases involved a collapse of part of the bunk (7 safety rails, one ladder and one base) resulting in a fall. The other case involved entrapment of the child's arm in part of the bunk.

Of the five-year age-groups, the admission rate is highest for 10-14 year olds at 22 percent which is substantially higher than the overall admission rate for the age-group. While the admission rate for under fives is similar to the overall admission rate for the age group, the admission rate for one-year olds is particularly high at 27.5 percent.

The most common non-fatal injuries associated with bunk beds are fractures (33 percent), three-quarters of which are upper extremity fractures. Bruising (21 percent) is the next most prevalent type of injury followed by lacerations (17 percent) and concussion (10 percent). These types of injury are most commonly associated with falls. Fractures and concussion result in the greatest number of hospitalisations (fractures accounting for 48 percent of admissions and concussion 20 percent). Injuries to the upper extremities are most common (38 percent) followed by injuries to the face (27 percent) and the head (13.5 percent).

RECOMMENDATIONS

General

1. Action should be taken by the Federal Bureau of Consumer Affairs and other responsible authorities to reduce deaths and injuries related to nursery furniture and bunk beds.
2. A general product safety directive should be adopted and enforced in Australia/New Zealand.
3. Safety guidelines for standardisation such as ISO/IEC Guides 50 and 51 should be actively promoted in Australia/New Zealand.
4. Where necessary to inform and monitor policy and action on product safety, research and evaluation studies should be commissioned.
5. Resources should be allocated, *where required to meet the recommendations which follow.

Standardisation

6. Standards should be developed for baby walkers, high chairs and change tables. No Australian/New Zealand standards exist. These standards should be based on the best available international standards or draft standards.
7. Children's furniture safety standards should be reviewed and, if necessary, modified at least once every five years, to ensure that new

requirements or revision of existing requirements occurs as new substantive information becomes available.

8. Compliance with voluntary nursery furniture and bunk bed standards should be actively improved by measures such as: seeking industry co-operation, public education by means of media and hot-lines and a policy of mandation if necessary.

9. As in the United States, mandation of standards should occur in Australia where voluntary standards and the marketplace are ineffective in achieving compliance and evidence warrants it.

10. There is currently sufficient evidence, at least in the case of household cots and portable cots to mandate standards. Both of these items are involved in deaths (at a rate of about 9 times that for other nursery furniture) and studies by the Australian Consumers' Association have repeatedly shown lack of compliance in the marketplace.

11. To avoid unacceptable "non-tariff" barriers to trade, Australia/New Zealand should focus initially on improving its safety requirements for nursery furniture in-line with other major importers of nursery equipment, particularly the United States.

Injury data collection

12. Hospital based injury surveillance should be implemented nationally to collect product-related injury data in sufficient detail and sufficient numbers to provide useful in-depth analyses and reliable secular trend data. It should contain sufficient cases by state to allow comparisons to identify best practice and effective interventions. There is potential for state support for options which would involve adequate numbers of cases to be collected to meet state needs.

13. Linkage of emergency department injury surveillance and hospital admission datasets should be undertaken to provide reasonably comprehensive information on moderate and severe injury cases (admissions).

14. The national coroner's data and information system, currently under development, should identify products and their involvement in deaths.

Research and evaluation

15. Household surveys should be undertaken to collect additional information with regard to nursery furniture, bunk beds and possibly other products of interest. It is recommended that the surveys be undertaken

collaboratively with other sectors or state departments interested in further exposure issues

16. Retail outlet observations of compliance of nursery furniture and bunk beds with Australian or overseas standards (where there are no Australian standards) should be conducted.

17. Studies should be undertaken to investigate second hand marketing. Compliance with standards, modifications to design, maintenance and general condition should be assessed.

18. In depth studies are required to conduct detailed tests of nursery furniture performance against test procedures, detailed in relevant standards, for current models in the market place.

19. A relative risk study should be undertaken for cots versus beds by age to determine the safest sleeping environment for children of different ages.

20. Follow-up case studies should be undertaken to determine whether child injuries associated with nursery furniture involve a range of factors which should be further investigated.

21. In depth investigations should be undertaken as coronial inquiries for all deaths involving nursery furniture.

22. Interventions should be evaluated:

- * The effectiveness of the letter sent to retailers by the former Minister for Consumer Affairs, regarding withdrawing baby walkers from sale could be investigated.
- * The effects of the introduction of new standards, and mandation of existing standards should be evaluated against injury data.

Dissemination of information

23. The findings of this report should be published in formats accessible to government, industry and other relevant professionals as journal articles on each of the major products and in Victorian Injury Surveillance System publications.

24. Point of sale information about the correct use of products and the associated hazards should be provided for parents and care-givers.

25. Community service TV advertisements should be produced to alert parents and care givers to nursery furniture risks at the time of implementing preventive measures such as mandatory standards or new voluntary standards.

This project was funded through the Consumer Affairs Division of the Commonwealth Department of Industry, Science and Tourism.

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Devon County Council Trading Standards & Consumer Protection

The Bunk Beds (Entrapment Hazards) (Safety) Regulations 1987

GENERAL

From 1 st September 1987, it is an offence to supply, offer to supply, agree to supply, expose for supply or possess for supply bunk beds or self-assembly bunk beds which do not comply with these Regulations. These offences may be committed by manufacturers, wholesalers, importers, retailers (including mail order) and by persons who hire furniture.

They also apply to retailers of second-hand goods.

As a result of a number of accidents where young children have slipped through gaps in the restraining rails and trapped their heads, these Regulations lay down permissible sizes of gaps in the structure of the upper bunk. This is to prevent the risk of injury, strangulation or suffocation.

WHAT THE REGULATIONS COVER

'Bunk-Beds' includes any bed with a sleeping surface which is 800mm (about 32") above the floor. This could also include cabin-type beds where there is only one elevated sleeping surface. The sleeping-surface is the base of the bed, not including the mattress or upholstery.

WHAT THE REGULATIONS REQUIRE

The Regulations lay down a range of measurements within which gaps in the structure of the upper bunk must fall. This is to provide a gap which is too small for a child's body to pass through and trap the head, but large enough to prevent an arm or leg being trapped.

Gaps in the base or sleeping surface must not be more than 75mm (about 3"). All other gaps in the structure must be not less than 60mm and not more than 75mm.

Where there is an opening in the side of the upper bunk to allow access, this gap must be at least 300mm (almost 12").

HOW CAN I TELL IF MY BUNK BEDS COMPLY?

A simple measurement can be made to find out the height of the upper sleeping surface (excluding mattress). If this is more than 800mm then measure any gaps in the headboard, foot board, side



rails, ladder to check whether the gap is the right size.

If the gap in the structure will pass a sphere diameter 60mm (about 2.5") but will not pass a sphere diameter 75mm (about 3") then the bed should comply.

When the bunk beds are reversible, so that either bed could be used as the top bunk, then both beds must pass the test for permissible gaps.

Even kits sold for self-assembly bunk beds must satisfy the Regulations and be able to pass the permissible gap test when constructed in accordance with the instructions.

This page last updated 13/Feb/ 1997

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ANPR for Bunk Beds

This comment is made in response to the advance notice of proposed rulemaking ("ANPR") FR Doc. No. 98-1457, found at 63 Fed. Reg. 3280 (1998) (issued Jan. 22, 1998).

Introduction

Over the years many children have died or been seriously injured while using bunk beds. These tragic instances have prompted investigations by the Consumer Product Safety Commission ("CPSC") and the adoption of voluntary safety standards by the American Furniture Manufacturer's Association ("AFMA"). Yet despite these efforts, children continue to be at risk of bunk bed-related harm, particularly from beds that do not meet the industry-promulgated safety standards. Consequently, the CPSC has issued an ANPR which suggests that the heretofore voluntary standards become mandatory for all bunk beds and solicits information and comments on the safety matter. As a law student with an interest both in child safety and consumer input in the regulatory process, I am writing in response to the ANPR. Because of the reasons stated below, I believe it in the best interest of the public for the CPSC to require that all bunk beds sold contain guardrails that adhere to the American Society for Testing and Materials ("ASTM") standard and include clear labeling warning parents of the dangers bunk beds pose to children.

Need for Mandatory Standard-Conforming Guardrails

For years the issue of child safety in bunk beds has perplexed parents, industry

figures, consumer safety advocates, and government officials. For 20 years now such groups have attempted to implement voluntary safety guidelines which will minimize the inherent risks to children. Yet as the data in the ANPR indicates, bunk bed hazards continue to linger despite the industry standards. Over 85 children have died since 1990 in bunk-bed-related accidents. Additionally, the CPSC received reports of 49 other “near-misses” during that period where a child could have been seriously injured or killed if another person had not intervened. Such figures underscore the need for further action to remedy the dangers posed.

Bunk bed fatalities generally come in three different manners. Some of the children have died by falling from the beds or being hanged with various objects. But by far the largest statistical risk of death comes from the childrens’ risk of becoming entrapped in the beds’ structure. Sixty-four percent (64%) of the fatalities occurred in this manner--a vast majority of the victims being under four years of age. Reason suggests that from the manufacturers perspective, it is these accidents that are the most preventable, because the addition of a suitable guardrail significantly reduces the risk of entrapment. Only three of the fifty four deaths occurred in beds that would have met the ASTM standard. Thus, it appears likely that a large percentage of current bunk bed fatalities could be eliminated if beds were constructed in accordance with recognized industry standards.

These standards require that top bunks have two guardrails with no more than a three and one-half inch space between the bed frame and the railing. The same maximum space requirement also applies for the distance between head boards and foot boards and the frame on the top bunk. Such a standard significantly reduces the

likelihood that a child will become dangerously entrapped in the bed frame by preventing his or her body from slipping off the side of the mattress area. Similarly, requiring that the guardrails extend at least five inches above the top of the mattress reduces the risk that children will accidentally roll off the bed while sleeping, thus making the beds safer from fall-related injuries. The ASTM standards thus address the statistically most common fatal hazards associated with beds.

A major problem with the current approach, however, is that many beds currently sold do not conform to these safety standards. As the ANPR indicates, there has been an ongoing pattern of noncompliance with the voluntary standards even among the larger bunk bed manufacturers. In the last 4 years, more than one-half million bunk beds made by 41 of the larger manufacturers were recalled by the CPSC. That amount constitutes nearly a quarter of the estimated number of bunk beds sold during the period and includes beds from almost half the major manufacturers.

The dangers posed by nonconformity with such standards are even greater in the smaller cottage industry and home-based bunk bed makers which may not be members of a organized trade association and consequently may not be as in touch with industry norms. Although such manufacturers make a relatively small segment of the bunk beds on the market, they constitute a major loophole in the existing voluntary trade association standard. And even small-scale lapses in safety are risky. As CPSC Chairperson Ann Brown pointed out in her statement in support of the ANPR, "Each of these non-conforming beds has the potential to kill a child."

This statement underscores the CPSC's role in routing out unsafe products. As is pointed out in the ANPR, the Consumer Product Safety Act authorizes the adoption

of agency action when there is not “substantial compliance” with a voluntary. The legislative history indicates that this threshold is not met when “an unreasonable risk of injury” is “adequately” reduced. I believe that given the cost/benefit analysis data provided in the ANPR, even a 90% compliance rate with the standards as suggested in the notice presents an unreasonable risk to childrens' safety.

Therefore, to reduce the instances of non-compliance with the heretofore voluntary industry guardrail standards, I believe it is in the public's best interest that adherence to those standards be required of all bunk beds being sold. The fact that the existing standards are currently voluntary may be giving some manufacturer's the false impression that they are optional and thus not very important. As the ANPR correctly points out, making the standard mandatory should increase compliance with the provisions merely by increasing “awareness and the sense of urgency” that such an adoption would convey. Bunk bed makers should be impressed with the serious nature of the safety concerns on learning that the CPSC has acted on the matter. This in and of itself may be enough to persuade some in the industry to produce safer products.

For those still reluctant to follow safety standards the enforcement provisions of a mandatory standard will create an additional incentive for manufacturers to create safe beds. Adopting an agency rule will empower state and local officials in the search to identify the noncomplying beds and prevent their sale. Fines imposed on retailers selling unsafe and unidentified bunk beds will discourage the introduction of such beds into the marketplace. Finally, the fines and negative publicity imposed directly on the manufacturers for noncomplying beds should serve as a strong deterrent for their production. The threat of having to pay penalties of as much as few hundred dollars for

each noncomplying bed sold will likely discourage most companies from making them.

The economic incentive to comply with mandatory standards will be especially strong because the costs of conforming with them are relatively modest. As the CPSC data indicates, it only adds approximately 10% to the cost of a bunk bed to add conforming bunk beds. This figure is substantially below the current estimated societal cost of the entrapment deaths per bed, making it in the best interest of consumers from an economic standpoint to have adequate guardrails. Those manufacturers that are not constructing complying beds should not be given a competitive price advantage over manufacturers producing the more costly standardized beds.

Mandatory Safety Warnings

While proper guardrails should reduce the number of bunk bed fatalities, it will not eliminate all the dangers associated with them. Bunk beds would still pose risks to users, particularly to the young and vulnerable. The CPSC notice reports that a majority of the most serious accidents involve very young children. A vast majority of those killed by entrapment were under four years old. It is consequently in the best interest of public safety to reduce the number of instances where such children are placed in potentially dangerous positions. Parents must be informed and warned of the hazards that a bunk bed presents.

To ensure that parents use bunk beds in as safe a manner as possible, the CPSC should require that all beds come with conspicuous warning labeling. Such warnings are already required under the voluntary ASTM standard, but as with the case of standardized guardrails, many manufacturers are not complying with it. Government

action is needed to guarantee that all parents are well informed of the needed precautions. Parents buying bunk beds in a store may falsely presume that the product is safe for any general use by young children if it does not come with an advisory warning. The CPSC can curtail those mistakes.

Product warnings should clearly explain to parents the inherent risks of bunk beds. They should notify consumers of the history of fatal entrapments and accidents. Finally, they should urge the parents to take proper safety precautions, including:

- Not allowing children under six years old on the top bunk.
- Not allowing children to play on the top bunk.
- Using the correct-sized mattress for the bed rather than one that may leave gaps between the frame in which a child may become entrapped or straggled.

Requiring safety labeling should reduce the likelihood that a young child will be injured in bunk beds at a very modest price. Adopting a labeling standard will add little to the manufacturers production price; once standardized warnings are adopted printing costs will be minimal. And, should unnecessary accidents be avoided in this manner, it becomes a very cost-effective safety measure.

Conclusion

Each injury and death attributable to bunk bed use is indeed lamentable. Ideally, one's bed should epitomize a zone of security and safety. But sadly bunk beds have all too often themselves been a threat to that safety. The CPSC should act now to eliminate the deadliest risks. By requiring that all beds contain guardrails and labeling

which conforms to existing industry standards, the CPSC will take a much needed step in fulfilling its mandate to protect the American public.

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Advanced Notice of Proposed Rulemaking for Bunk Beds

63 FR 3280

Following is a comment on the need for a mandatory standard for bunk beds and alternatives that would entice companies to conform to the standard. I am a second year law student and actually grew up sleeping on bunk beds. The Consumer Product Safety Commission believes that "unreasonable risks of injury and death may be associated with bunk beds constructed so that children become entrapped in the bed's structure or become wedged between the bed and a wall."¹

I. The Potential Need for a Mandatory Standard

I believe that the unreasonable risks of injury and death occur because of the lack of a mandatory standard. Given the number of deaths involving young children, it is obvious that the voluntary standard is rarely enforced, and therefore does not work. In July 1988 the American Furniture Manufacturer's Association published Revised Voluntary Bunk Bed Safety Guidelines which addressed the problem of entrapment in the opening of the guard rails on bunk beds. However, a significant problem still exists--the standard is voluntary. How can you force a company which is in business to create profit comply with a standard that is not mandatory and will cost them more money and reduce profits? The only way to force companies to comply with a standard is to make it mandatory. I think the most important thing is to have a warning label and instructions provided the consumer when he buys a bunk bed. Many

¹ 63 FR 3280

people might not know the dangers inherent in bunk beds. Most consumers do not consider a bed to be dangerous. If the consumer was made aware that there is a possibility that their child could become entrapped in the bed or between the bed and the wall, I am sure the consumer would take precautions.

Between 1990 and 1997, 54 children died from entrapment. Almost all of the entrapment deaths occurred in children age 3 or younger.!! I believe that many deaths could be prevented by simply telling consumers not to put the bunk beds against a wall. If you inform consumers that their children run the risk of death if the bed is placed against a wall, it seems logical that they would not do it. So, if consumers are made aware that bunk beds MUST NOT be against a wall and there is a mandatory standard on how bunk beds should be manufactured, many deaths of young children would be prevented.

There are four regulatory alternatives for the Commission to consider. They are: additional performance standards to supplement the entrapment provisions of the existing standard, improved voluntary standards, the potential for labeling or instruction, and a mandatory standard.³ I think the first two alternatives will not work because similar, but less stringent, standards have failed to work thus far. With the existing standard, companies have a choice whether to implement the standards or not. That is what is meant when a standard is voluntary. Since there have been 54 deaths already just from entrapment, something is not working with the existing standard. Even if the commission were to implement an

² 63 FR 3280 pg. 3

³ Id pg. 7

improved voluntary standard system, there is no way to know if it would improve the risk of fatal injury to children. Considering the current situation, it doesn't seem to me that the improved standard would do much of anything. A business is not going to spend more money on the production of its product if it is not required to do so. Therefore, I think the only way to make businesses increase the safety of their product is to invoke a mandatory standard.

The most important question in implementing a mandatory standard is how. How are we going to make sure that the business complies with the new standard? I think that we should send a notice to all of the manufacturers of bunk beds telling them what the new standard is and if they do not comply with this standard in 3 months then there should be a considerable monetary penalty. The Commission could then send workers out to the manufacturing plant unannounced to ensure that the bunk beds are being made true to form. The problem currently is that bunk bed manufacturers are not complying with the existing voluntary standard. In February 1997, Commission's Office of Compliance assigned 45 inspections of bunk bed retailers. Examination of 77 beds from 35 different manufacturers revealed that 12 bunk bed designs did not conform with the entrapment requirements of the voluntary standard.⁴ Problems identified through these inspections resulted in recalls. One of them pertaining to 16,500 beds. If there had been a mandatory standard, the business would have known what to do and would have saved themselves considerable time and money. Another way that a mandatory standard would help is to ensure that

⁴ 63 FR 3280 pg. 4

all manufacturers understand the same standard. There is too much flexibility in the standard which creates inconsistency in the way businesses interpret the standard.

II. The Economic Impact of a Mandatory Standard

If the Consumer Product Safety Commission is to implement a mandatory standard, it will economically affect the bunk bed business. “Industry sources estimate that 500,000 bunk beds are sold each year for residential use. . . and the annual retail value of sales has been estimated at about \$150 million.”⁵ There are at least 106 bunk bed manufacturers and 40 of them are either members of the American Furniture Manufacturer’s Association or are members of the subcommittee that developed the existing voluntary standard for bunk beds. Since there is a substantial amount of money made in the bunk bed business and many manufacturers are still making them, there will be an impact if a mandatory standard is implemented.

Some manufacturers have conformed to the entrapment requirements of the existing voluntary standard. They provide information that the most expensive modification to the bed was adding a second guardrail to the top bunk. This addition amounted to an increase of \$15-40.⁶ The manufacturers are going to complain that if a mandatory standard were implemented, it will increase production costs, which would then be imputed to consumers in higher prices. But I ask you: How many parents do you know would buy something unsafe just because it might be \$40 cheaper.

⁵ 63 FR 3280 pg. 4

⁶ Id pg 6

Manufacturers will also complain that revenue will decrease because consumers, disgruntled by higher prices, will stop buying bunk beds. Furthermore, if this is the most expensive addition, it could not cause the prices of the bunk beds to increase substantially.

The CPSC estimates that the cost to society of bunk bed entrapment deaths is about \$174-346 per bed over its expected useful life. The costs of conformance with entrapment requirements range from \$15-40 per bed. Rather than shifting costs to society by making them foot the bill, it seems logical to make consumers who want to buy the bunk beds pay an extra \$15-40 especially when it involves the safety of their children. It also makes sense for manufacturers who make bunk beds to take responsibility for the safety of their products. In this day and age, with increasing product liability litigation inundating the court system, it is in the best interest of the bunk bed industry to try and make their products as safe as possible. The question I would pose to the manufacturers is this--Would you rather comply with the mandatory standard and pay \$15-40 more or would you rather pay millions when a grieving parent sues you because his or her child became entrapped in one of your bunk beds?

As stated earlier many children are dying because bunk beds are not manufactured properly or because consumers are not made aware of the dangers inherent in bunk beds. If a mandatory standard was imposed, bunk bed manufacturers would then be able to design bunk beds in the safest manner possible. The manufacturers would not have to dip into their profits because a higher price would be charged the consumer not the manufacturer.

The best alternative for consumers, children, and manufacturers is to implement a mandatory standard. Therefore, everyone will be assured his or her safety.

A handwritten signature in cursive script, reading "Dedra L. Thomas", written over a horizontal line.

Dedra L. Thomas
1629 Chenoweth Circle
Knoxville, TN. 37909

CONSUMER PRODUCT SAFETY COMMISSION

DOCKET NO. 98-1457; 63 FR 3280

**COMMENTS OF F. NICOLE GRAY REGARDING
THE ADVANCE NOTICE OF PROPOSED RULEMAKING FOR BUNK BEDS**

This comment will address the proposal to create a mandatory standard for bunk bed requirements in an effort to decrease injuries and deaths from entrapment. After reading the advance notice of proposed rulemaking, conversing with furniture retailers in the Knoxville, Tennessee area, and discussing this issue with concerned parents, I can understand why some believe that mandatory, not voluntary, standards are essential in protecting against bunk bed related accidents. However, I have doubts as to whether the enactment of a mandatory rule is the only way to decrease risks from entrapment. Because there still appears to be bunk bed incidents from beds which adhere to the voluntary standards, I believe that a revision of the voluntary rule should be considered first before the implementation of a mandatory rule. In addition, I believe that other alternatives, such as educational pamphlets, public service ads, and retailer warnings, should first be looked into to see if they alone can decrease entrapment-related incidents.

One of the reasons the Commission gives for suggesting a mandatory standard is because of the "continued reports of deaths and other incidents associated with bunk beds." According

¹63 Fed. Reg. 3280 (1998) (to be codified at 16 C.F.R. Chp. II) (proposed January 22, 1998).

to the ANPR, over a span of seven years, fifty-four entrapment-related deaths have occurred,* an average of almost eight deaths per year. Although it is certainly distressing to hear of injuries or deaths stemming from bunk bed hazards, given the fact that over a half a million beds are sold each **year**,³ it is arguable whether the number of entrapment-related incidents are significant enough to provoke a mandatory rule instead of a revision of the voluntary standard. Is there any proof that only a mandatory standard can decrease bunk bed related incidents?

Furthermore, although the majority of deaths occurred in beds which did not conform to the voluntary standard, the ANPR notes that three deaths occurred in beds which in fact followed the **standard**.⁴ How would making the voluntary rule mandatory decrease deaths in conforming bunk beds? And what about bunk bed injuries? Although the ANPR did not address this issue, I believe it is important to know how many “near misses” involved conforming beds. If there has been a substantial number of near misses in conforming beds, I believe that this would signal a need for a revised voluntary standard instead of a mandatory standard.

A greater argument for a mandatory standard could be made if the number of deaths from entrapment seemed to be on the rise. However, the number of entrapment-related deaths seem to show no distinct pattern, instead randomly rising and falling from year to year. Given the fact that three deaths (and possibly a significant amount of injuries) occurred in beds which conformed to the voluntary standard, and also given the fact that most the entrapment victims were children three years of age and younger, it is debatable whether making the voluntary standard mandatory would significantly reduce the risk of injury to pre-school children and toddlers. I believe that further research in this area should be made before the CPSC decides that a mandatory rule

²Id.

³Id.

⁴Id.

should be promulgated.

In the ANPR, the Commission also states that there has been “a continuing pattern of nonconformance to the voluntary **standard**.”⁵ According to the ANPR, out of eighty-five bunk bed manufacturers surveyed in 1994, seventeen had bunk beds that created a potential hazard for **consumers**.⁶ Again, this is a significant number, and it does show a need for some sort of guideline that manufacturers must follow. However, in the next sentence, the Commission goes on to say that based on consumer responses and reported incidents (among other things), “41 manufacturers have recalled wooden and metal bunk beds that did not conform to the entrapment requirements in the ASTM standard.”⁷ The willingness of manufacturers to recall non-conforming beds seems to illustrate both their concern about the safety of their products and their commitment to decrease bunk bed related incidents.

The real question here seems to be not whether there are enough incidents of entrapment related deaths to prompt a mandatory rule, but whether the bunk bed manufacturers are responsibly taking as many precautions as they can to decrease entrapment-related incidents. From my reading of the ANPR and my conversations with two Knoxville retailers, the answer to this question seems to be yes. As stated in the ANPR, over seventy-five percent of the bunk beds out on the market today are manufactured by firms who are members of either the AFMA or the **ASTM**.⁸ Currently, all one hundred and six manufacturers identified by the Commission are manufacturing beds which comply with the voluntary entrapment **standards**.⁹ These numbers

⁵Id.

⁶Id.

⁷Id.

⁸Id.

⁹Id. at 3283.

seem to show a substantial effort on the part of most manufacturers to adhere to the voluntary standards.

Even if one does not want to leave it up to the manufacturer's own sense of obligation to **adhere** to the voluntary standards, however, I believe that retailers provide a further incentive for manufacturers to provide safe products for consumers. Upon arriving at one of the retail stores which sold bunk beds, I was **surprised** to learn of the salesperson's knowledge of the ASTM standards. In fact, the salesperson seemed to hold the standards in such high regard that a consumer could have easily left with the impression that the standards were mandatory, not voluntary. Both that particular retailer and another Knoxville retailer I visited maintained that they only buy from manufacturers who adhere to the voluntary standards, thus giving credence to the idea that manufacturers and retailers do take these standards seriously.

Although there may be some small regional manufacturers who do not wish to comply with the voluntary standards, I believe that pressure from retailers, consumers, and other groups may **be able** to convince those manufacturers otherwise. A manufacturer's reputation and credibility in his field is very important, and the refusal of retailers or consumers to buy non-conforming products can have a great impact on his business. Besides pressure from consumers and retailers, however, there is always the threat of legal action against those manufacturers who show total disregard for consumer safety. As one source noted, "[u]nder prevailing strict liability law in all 50 states, juries are empowered to **award** stratospheric damages against a manufacturer of an unreasonably unsafe bunk bed that causes a child casualty. No proof of negligence is required."⁴ The possibility of such a potentially damaging lawsuit could persuade many non-conforming manufacturers to adhere to the voluntary standard.

⁴"Bruce Fein, Bunk *Bed Safety Bunko*, The Washington Times, January 20, 1998.

Of course, the Commission does have some valid arguments for enacting a mandatory standard. As the Commission notes, the enactment of a mandatory standard would allow the Commission to seek penalties and fines for any violations of the standard, something which may deter manufacturers from making non-conforming **beds**.¹¹ In addition, the Commission noted that the cost of adhering to the standard's mandatory requirements would be relatively inexpensive compared to the **benefits**.¹² However, I am still not sure whether these reasons are substantial enough to enact a standard which may not be needed in the first place. Although a revised **voluntary** standard may not allow for the imposition of penalties or “even the playing field” between conforming manufacturers and non-conforming manufacturers, it can increase manufacturers’ awareness about the need for compliance by explaining thoroughly the entrapment hazards and illustrating ways to avoid them. Since most manufacturers **take** the voluntary standards very seriously and are currently complying with them, it is very likely that they will continue to follow the standards if stricter guidelines are **enacted**.

Instead of trying to enact a mandatory standard, I believe that the voluntary standards should be revised. However, I believe that the revised standards should also include educational methods such as pamphlets, public service ads, and retailer communications with consumers to inform consumers of entrapment-related incidents and afford them the greatest amount of protection. In my talks with the furniture retailers, I noticed that although retailers prided themselves on buying from manufacturers who abided by the voluntary standards, none of the retailers spoke with consumers to inform them of the risks associated with from bunk bed entrapment. According to the retailers, the only material bunk bed buyers receive about

¹¹Id. at 3283.

¹²Id.

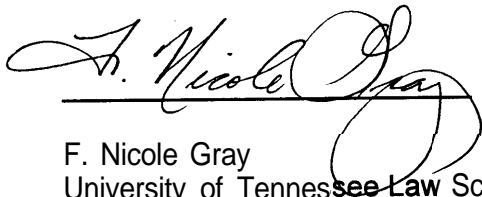
entrapment hazards is a small gold warning label which is included in the bed **packaging**-- something which in my opinion, does not adequately identify the risks involved with bunk beds. In fact, as I spoke to parents who had recently purchased bunk beds, I found out that many consumers are completely unaware of entrapment risks.

Both my sister and my aunt are parents who have recently bought bunk beds, and they had absolutely no idea of the injuries associated with bunk beds. Both had arranged for their bunk beds to be assembled by the retailer, and neither parent was warned by the retailer of the **dangers**. Although I was told by the retailer that a gold warning label usually comes with the bed's packaging, my aunt and sister **maintained** that they never even saw the bed's packaging, since like many consumers, they had the beds assembled by the retail store's employees. In addition, my sister related that as she was showing the employees out her home, her 3 year-old son had climbed onto the top bunk and was dangerously playing around on the top bars. Luckily, my sister came back into the room before any serious mishaps occurred, but since then, she told me, she has had several entrapment incidents with her son, including one where his head became stuck between the ladder rails. I don't know if my sister has a bunk bed which conforms to voluntary standards. Nor am I certain that a mandatory standard will not decrease the risk of injury to consumers. But given the fact that injuries can and probably will still continue to occur from both conforming and non-conforming beds, I think that a better alternative would be to not to merely require manufacturers to adhere to standards which they already comply with, but to revise the **current** voluntary standards to include informative methods which would put consumers on alert and inform them of the risks involved.

Having a mandatory rule can be beneficial for a number of reasons. It may decrease the number of injuries stemming from entrapments, and it can offer a concise rule that manufacturers must to follow. But I believe that in order to create such a rule, it must be shown that no other

alternatives can create the same results. Here, I believe that a revised voluntary standard can have as much power and strength as a mandatory standard, and more importantly, it could work to the benefit of both the manufacturer and the consumer.

Respectfully submitted,

A handwritten signature in cursive script, reading "F. Nicole Gray", written over a horizontal line.

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ANPR for Bunk Beds
16 C.F.R. Chapter II
Office of the Secretary
Consumer Product Safety Commission
Washington, D.C. 20207-000 1

COMMENT REGARDING THE PROPOSED RULE MANDATING BUNK BED PERFORMANCE REQUIREMENTS
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I. Introduction

This comment will address the proposed mandatory rule recommended by the Consumer Product Safety Commission (“Commission”) concerning the safety of bunk beds. As the Commission detailed in its Advanced Notice for Proposed Rulemaking, 63 FR 3280, (“ANPR”) it believes that “a rule mandating bunk bed performance requirements” will help to eliminate the failure of manufacturers to abide by the voluntary standards that are currently being utilized and also to reduce the overall number of injuries and deaths that have resulted from the ownership and use of bunk beds. I am a third year law student at the University of Tennessee and a concerned uncle and future father and consider it important to address this rule proposed by the Commission. I firmly believe that a mandatory rule in this area is essential to protect the health and safety of children and young adults alike who use bunk beds, but in order to be more effective than the current voluntary standards, the rule must address every possible safety concern. This includes requiring (i) the implementation of the bunk bed performance requirements currently outlined in the voluntary standards and those proposed by the Commission; (ii) additional standards to further eliminate entrapment concerns as well as address injuries and deaths caused by falls and hangings; and (iii) labeling and instruction requirements to accompany every bunk bed manufactured or imported in the United States.

The following comment will address why a mandatory rule is needed but why the rule proposed by the Commission is insufficient to address every concern with bunk bed safety.

II. Need for a Mandatory Rule

Bunk Bed Related Deaths'

Cause of Death	1990-1997	1992 -1997
Entrapment	54	39
Hanging	23	19
Falls	8	5
Total	84	63

The significance of these statistics lies in the fact that all of these deaths have occurred since 1990. Since 1990, voluntary standards have been offered by the American Furniture Manufacturer's Association ("AFMA") to help address safety concerns with bunk beds. More specifically since 1992, 63 deaths have occurred since the Standard Consumer Safety Specification for Bunk Beds, ASTM 1427-92, was implemented at the request of the Commission to create voluntary performance requirements primarily concerned with falls from upper bunks, entrapments in the upper bunk and security of the foundation support system². This chart does not even address the number of injuries that do not result in fatal accidents. For instance from 1990-1997, in addition to the 54 deaths that were caused by the entrapment of young occupants, there were 49 incidents that resulted in injuries³. In all, an estimated 35,000 injuries related to bunk beds have occurred that have resulted in trips to the emergency room⁴.

All of these numbers reveal that the voluntary standards currently being enforced by the Commission are not adequately protecting the safety of children and young adults and another course of action needs to be taken. When you are considering the lives of young children, if every domestic and foreign manufacturer and retailer is not willing to abide by the measures

needed to protect the safety of these young people then thorough mandatory standards need to be implemented to force these companies to produce and sell bunk beds that are as safe as possible.

The current voluntary standards are simply inadequate. Some companies simply refuse to follow the voluntary standards because the implementation is not cost-effective. For example, when the entrapment fatalities from 1990-1997 are analyzed a little more closely, it is revealed that with three exceptions all of the deaths were the result of beds that did not meet the voluntary standards currently in place. Also, more than 500,000 beds from 41 manufacturers have been recalled since November 1994 that do not meet the voluntary standards!

The concerns with the voluntary standards extend beyond the fact that some manufacturers refuse to enforce them. The fact that three of the entrapment deaths during this time period occurred in beds that do conform to the voluntary standards leads to the conclusion that the voluntary standards have not addressed every performance concern and need to be modified to further eliminate these accidents.

For an opposing view, Mary Gall, a member of the Commission who voted against the issuance of this ANPR, argued the voluntary standards provide the highest possible protection to consumers. She bases her opinion partly on the statement in the ANPR that all known bunk bed manufacturers are currently in compliance with the voluntary standards! Furthermore, in Ms. Gall's view, mandatory rules will not (alleviate the responsibility of parents to keep their young children from playing on these dangerous products and from keeping children under six years old from sleeping on the top bunk where the majority of the incidents occur with children under this age'. A commentary by Mr. Bruce Fein went on to address the belief that strict liability laws in all 50 states will encourage most manufacturers to implement as many protection measures as possible and that mandatory **rules** will only serve as overkill in this period of supposed

deregulation. To Mr. **Fein**, mandatory safety measures that would have eliminated the majority of the 54 entrapment deaths in 24 billion bunk-bed days from 1990- 1997 is not significant enough to enforce stricter standards **and** impose higher costs on the companies in this **industry**⁸.

While on the surface these are valid arguments, more recent research and a more humanist approach reveal that the **views** of Ms. Gall and Mr. Fein are not well-founded. While the ANPR stated that basically all of the known 106 bunk bed manufacturers are currently satisfying the voluntary standards, the Chairman of the American Society of Testing Materials (“ASTM”), whose organization does all of the testing of the bunk beds, was quoted as saying as recently as last month that only 90% of the known 106 bunk bed manufacturers are in compliance with the voluntary standards’. Assuming his statistics are correct, 10% of the manufacturers not satisfying the voluntary standards is a significant amount, especially when the **health** and safety of children and young adults are involved. I would argue that it is a significant enough amount to require mandatory compliance. Even beyond the 106 known manufacturers,, there are numerous small manufacturers that enter this market every year that go undetected by the Commission and often claim that **they** do not know of the voluntary standards because they are not members of the appropriate trade associations. The only way to avoid allowing these small, unknown companies as well as the ones that are known by the ASTM to not be in compliance to skirt the safety standards is to issue a mandatory rule.

I agree with another major point of both Mr. Fein and Ms. Gall that no matter what performance standards are made mandatory, all future incidents will not be eliminated because of the inherent dangerous characteristics of bunk beds. Eliminating just a few of these accidents is important enough though to force **manufacturers** to take every measure possible to keep the number of incidents to a bare minimum. The ANPR estimates that an additional cost of **\$15-\$40**

must be borne by the customers to incorporate the mandatory performance standards into the products. This appears to be a truly insignificant cost even if it only results in the saving of one life or the elimination of a few injuries. Furthermore, we should not rely on strict liability laws to penalize a company after the fact when the majority of the problems can be cured now?

III. Benefits of a Mandatory Rule

I agree with the Commission that a mandatory rule will produce many beneficial repercussions. Most importantly, a mandatory rule creates a sense of urgency in all companies to abide by the standards or suffer the consequences. Knowing that you will be face a civil fine and your company name will be identified to the public because of noncompliance will stimulate awareness and urgency among **all** the competitors in this industry. This type of penalty is much more effective than simply making a company recall its product. A company can currently claim ignorance as to the voluntary standards and use the recall of a product to create favorable advertising by claiming that it is taking this course of action with the welfare of the buying public in mind, especially to protect the lives and safety of children.

Another benefit of a mandatory rule will be to eliminate the competitive and cost advantages some companies currently enjoy. By not incorporating some of the performance standards with only the threat of a recall, some manufacturers are reducing the costs of their products and consequently the retail price. By forcing every manufacturer to abide by and implement the same standards or suffer the consequences discussed above, these costs advantages will be eliminated. This will have the secondary effect of increasing the barriers to entry and keeping some of the smaller, unknown manufacturers who are not concerned with the safety of consumers from coming into this competitive market.

Penalizing retailers and distributors will also prove beneficial because it will hold them accountable for the products that they are selling. This will force these companies to develop relationships with credible domestic **and** foreign manufacturers who are willing to abide by the performance standards and other requirements of this mandatory rule. This will put added pressure on domestic and foreign manufacturers to abide by the rule because of the **difficulty** they will experience in selling their bunk beds without a credible retailer or distributor to market the products. Furthermore, as retailers and distributors begin to market the bunk beds, a selling point will be the compliance with the mandatory rules of the Commission and the reputation of those manufacturers who do not comply with the standards will become significantly hampered.

The benefits of the mandatory rule even extend to the import of bunk beds from foreign manufacturers and distributors. By having a mandatory standard, U.S. Customs can alleviate the possibility of products that do not **satisfy** the rule from reaching U.S. retailers. This may ultimately save the life of a young child. Just like the new, small manufacturer, the ignorance of the standards by foreign manufacturers and distributors is not enough justification to allow these companies to sell unsafe products.

IV. Source and Coverage of the Mandatory Rule

Problems Caused by Existence of Voluntary Standards

As the ANPR discusses, the existence of the voluntary standards created by the ASTM and AFMA hampers the implementation of a mandatory standard. The Commission is not allowed to issue a standard under either of the applicable statutes unless the Commission finds that (i) compliance with such voluntary standard is not likely to result in the *elimination or adequate reduction* of such risk of injury; or (ii) it is unlikely that there will be *substantial compliance* with **such** voluntary standard". A great deal of effort is spent in the ANPR to prove

that there is not substantial compliance with the voluntary standards and therefore the Commission may propose a mandatory rule under the second alternative. While I feel that the argument made by the Commission is adequate enough to prove that there is not substantial compliance because of the deaths and injuries that have continued after the implementation of the voluntary standards, I think that an equally valid argument can be made under the first alternative. As discussed earlier, three entrapment deaths have occurred since 1990 in bunk beds that comply with the voluntary standards. While this number appears small, it is still a statistic of three young children who have died because of the inadequate safety measures of a bed. The voluntary standards therefore appear inadequate in their current form. The standards could be amended as they have been in the past to include further performance measures that would have possibly alleviated these three deaths, but there is no guarantee that manufacturers will incorporate these changes into their products. Ten percent of the manufacturers do not abide by the voluntary standards as they currently exist and this number will almost certainly grow if new specifications are added thereby increasing the costs of manufacturing. The only way to ensure that the manufacturers will abide by increased standards is to implement a mandatory rule.

Codify the Rule Under One Statute

Since it appears clear that the Commission can issue a mandatory rule despite the existence of voluntary standards, another problem exists that must be addressed. As the ANPR discusses, there are two sources of law that may be utilized to create a mandatory rule regarding safety standards for bunk beds. The Federal Hazardous Substances Act (“FHSA”) authorizes regulation of mechanical hazards that pose unreasonable risks of injury to children’¹. The Consumer Product Safety Act (“CPM”) authorizes regulation of unreasonable risks of injury associated with “consumer products”¹². Utilizing the CPSA to promulgate one consistent

mandatory rule would provide the most **efficient** results because it would apply to both children and young adults, thereby eliminating any confusion by manufacturers and retailers who produce and sell products to both of these markets. Beyond the confusion that would be created, several questions would arise if two different rules are codified. For instance, think of the situation where a bunk bed can be categorized as both a product for children and young adults. Which statute would apply to this product? Another problem may arise if a retailer sells primarily children's beds but accepts larger bunk beds in a trade and wants to sell the used bed. Do we really expect this retailer to know to look to two different statutes for performance standards and other requirements? These questions can easily be answered by promulgating a rule under one statute, the CPSA. The only restriction to creating the rule under the CPSA when the FHSA is equally applicable, is the Commission must find that it is in the public interest to do so¹³. This hurdle is easily overcome, as the APRN discusses, because alleviating the confusion by applying one statute is essential especially when the lives of children and young adults are involved.

Coverage of the Mandatory Rule

Knowing that it is crucial to implement a mandatory rule, the breadth of the rule must be broad enough to ensure that as many safety precautions as possible have been undertaken to protect the lives and safety of children and young adults who utilize bunk beds. Otherwise, a mandatory rule will not produce **significant** improvements over the voluntary standards. The elimination of as many accidents as possible should be the focal point of any rule issued. While I agree with the Commission's decision to try to improve the performance standards in order to eliminate entrapment concerns, the decision not to consider performance requirements related to falls or hangings will not benefit the general public as much as a rule that tries to address as many concerns as possible. While falls and hangings of children and young adults do not

account for the number of deaths that entrapments do, they still pose significant concerns that need to be addressed by the Commission in any mandatory rule that is adopted. As one author pointed out, most of the 35,000 bunk-bed related accidents that have resulted in emergency room visits have resulted from falls from the top bunk¹⁴. Therefore, if standards are not adopted now to address the concerns with falls and hangings these type of incidents will continue to occur and the Commission will have to later amend the rule. This will require more lobbying and expense not to mention the further confusion of manufacturers and retailers as to what specifications they must satisfy. A majority of the falls and hangings could be eliminated by requiring all bunk beds to have two guardrails, a headboard and a footboard, all of which are required to have minimum heights beyond the height of the mattress. A greater concern is eliminating accidents that result from children jumping from the top bunk. Having shorter maximum height requirements from the top bunk to the floor will help decrease the impact of a child jumping from a such a distance.

Beyond the performance standards, it is essential that the Commission adopt labeling and requirements to ensure compliance. As discussed, one of the biggest benefits of a mandatory rule is to force all manufacturers to abide by the standards or suffer the consequences of a civil fine and public ridicule. The only way to enforce these penalties and punish the violators is to require all manufacturers to place appropriate identification labels on every bed so that the Commission can easily trace the products. A restriction must be placed on the retailers and distributors' as well by not allowing them to sell products that does not have an appropriate label.

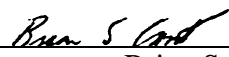
To supplement the performance standards, a requirement that every product have proper warnings and instructions is also crucial to protect the lives and safety of the consumers. As it has been documented, not all concerns can be addressed by performance measures, so parents and users of bunk beds need to be made aware of the type of incidents that often occur from the

use of these products. Individuals tend to be ignorant when it comes to the safety of a product, especially one that is categorized as a bed. Requiring warnings and instructions to accompany every bunk bed will help to draw the attention of potential consumers to safety concerns, especially parents who have young children who like to play on a bunk bed or do not know that the majority of entrapment deaths occur in the top bunk with children under six years of age¹⁵ and that children under this age should be restricted to the bottom bunk.

V. Conclusion

I appreciate the Commission's consideration of the health and safety concerns that accompany an inherently dangerous product such as a bunk bed. The Commission has tried to rely on voluntary standards for the past fifteen years, hoping that manufacturers would see the importance of abiding by the standards. This has proven unsuccessful as numerous deaths and injuries have continued to occur as the result of manufacturers insistence on producing unsafe beds. As Commission officer was recently quoted as saying, "The more bunk beds we recall, the more nonconforming bunk beds we find."¹⁶ Furthermore, accidents continue to occur with beds that meet the voluntary standards. These revelations lead to only one conclusion: A mandatory rule needs to be implemented to force manufacturers and retailers to abide by these standards and the performance standards implemented need to be improved to address as many safety concerns as possible. This rule must address performance standards related to entrapment, falls and hangings as well as require appropriate labeling and instructions to accompany all products.

Respectfully submitted,



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- ¹ Advanced Notice of Proposed Rulemaking, Consumer Product Safety Commission, 63 FR 3280, Jan. 22, 1998.
- ² **Id** at 3281.
- ³ *Id.*
- ⁴ “Personal Tragedy Ignites Bunk Bed Safety Campaign”, *The Commercial Appeal (Memphis, TN)*, E5, Feb. 14, 1998.
- ⁵ “Voluntary Standards Mean Bunk Beds Still Could Kill”, *The New Orleans Times-Picayune*, F5, Feb. 3, 1998.
- ⁶ Advanced Notice of Proposed Rulemaking, Consumer Product Safety Commission, 63 FR 3283, Jan. 22, 1998.
- ⁷ Gall, Mary Sheila. Commentary, “Federal regulations won’t stop killer bunk beds”, *The Washington Times*, A 16, Jan. 26, 1998.
- ⁸ Fein, Bruce. Commentary, “Bunk bed safety bunko”, *The Washington Times*, A 13, Jan. 20, 1998.
- ⁹ Sloan, Janet. “How do bunk beds stack up?”, *The Dallas Morning News*, 1 G, Feb. 13, 1998.
- ¹⁰ Advanced Notice of Proposed Rulemaking, Consumer Product Safety Commission, 63 FR 3284, Jan. 22, 1998.
- ¹¹ FHSA §2(f)(D), 15 U.S.C. 1261(f)(D).
- ¹² CPSA §3(a)(1), 15 U.S.C. 2052(a)(1).
- ¹³ CPSA §30(d).
- ¹⁴ “Personal Tragedy Ignites Bunk Bed Safety Campaign”, *The Commercial Appeal (Memphis, TN)*, E5, Feb. 14, 1998.
- ¹⁵ Sloan, Janet. “How do bunk beds stack up?”, *The Dallas Morning News*, 1 G, Feb. 13, 1998.
- ¹⁶ “Voluntary Standards Mean Bunk Beds Still Could Kill”, *The New Orleans Times-Picayune*, F5, Feb. 3, 1998.

BEFORE THE CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Chapter II

ADVANCE NOTICE OF PROPOSED RULEMAKING FOR BUNK BEDS

**COMMENT OF INTERESTED PERSON REGARDING MANDATORY
GUIDELINES FOR BUNK BED SAFETY**

Introduction

On January 22, 1998, the Consumer Product Safety Commission (CPSC) issued an advance notice of proposed rulemaking. The CPSC has requested comments to address the potential need for a rule that would mandate bunk bed performance requirements.¹ As a law student currently enrolled in an Administrative Law course, I am submitting this comment in order to explore and experience administrative procedures and to voice my opinion on an important safety issue.

Bunk beds are currently only regulated by voluntary performance standards. In light of the continued death and accident rates as a result of unsafe bunk beds, I support the idea of mandatory bunk bed guidelines and I further believe that:

- (1) The current voluntary standard system is inadequate;
- (2) The statutory threshold for issuing a mandatory standard is met;
- (3) The CPSC should therefore issue a mandatory standard under the Consumer Product Safety Act (CPSA); **and**

¹ **See** Bunk Beds; Advance Notice of Proposed Rulemaking, 63 Fed. Reg. 3280 (1998)(to be codified at 16 C.F.R. chap. II)(proposed Jan. 22, 1998).

(4) In addition to **mandatory** performance standards, an education and awareness bunk bed safety campaign must be implemented by both the Commission and the bunk bed industry.

Comment:

Inadequacy of the Current Voluntary Standard System

Safety issues pertaining to bunk beds have been important concerns for approximately twenty years. In this time period, the most important regulation produced was the Voluntary Bunk Bed Safety Guidelines. Although such guidelines have attempted to address safety concerns associated with bunk beds, their impact on safety has proven to be inadequate.

First, the current system is inadequate because of the substantial market demand for bunk beds and their use by children. Bunk beds have proven to be a consumer product that is important to household consumers as evidenced by the fact that over 500,000 bunk beds are sold each year.² For parents, bunk beds provide an option for efficient use of floor space, and for children, bunk beds are considered unique, **fun**, and even an adventure. With parents and children alike approving of bunk beds, they are a product that will be continued to be sold with regularity. Thus, because bunk beds are an important consumer product with safety concerns they **are** in need of government safety regulation.

Second, the current system is inadequate because the recall system is inefficient and unsafe. Under the current system, manufacturers have the option to comply with safety guidelines. When a serious safety concern does arise, **often** because the bunk bed does not comply with the voluntary guidelines, the bunk beds are recalled by the Commission. Since November of 1994, approximately 500,000 bunk beds have been **recalled**.³ Not only

² 63 Fed. Reg. at 3282.

³ **See** Dan Oldenburg, Bunk Bed Safety, Wash. Post, Feb. 4, 1998, at D5.

is this system an inefficient use of the Commission's time, but it is unsafe. This system places an undue safety burden on the consumer. A bunk bed recall will only occur when at least one person, likely a child, has become seriously injured or killed because of a particular bunk bed feature. No one will know the bed is dangerous until someone is sacrificed. Further, in the time it takes to evaluate the injury or death and the Commission actually recalls the bunk beds, hundreds of children are at risk each night when they go to sleep or each time they lay down to take a nap of a similar injury occurring to them. This substantial risk inherent in the recall system is an unnecessary evil.

Third, the current system is inadequate because children are continuing to be injured and killed by bunk bed designs and features. The data compiled by the Commission as well as that discovered by the news media is astounding. As cited, since 1990, fifty-four children have died from bunk bed entrapment whereas an additional forty-nine were injured from similar incidents. Another twenty-three children were killed by strangulation. Other children have also been injured and killed as a result of suffocation. Additionally, approximately 35,000 bunk bed related injuries are reported each year.⁴ Although realistically some injuries are bound to occur even with mandatory standards, there is no reason to be idle and permit so many bunk bed related fatalities and injuries to American children when other options clearly exist.

Statutory Threshold Met

A new mandatory standard cannot be established and implemented under the Consumer Product Safety Act (CPSA) or the Federal Hazardous Substances Act (FHSA) if the industry has adopted a voluntary standard. However, as noted in the notice's discussion provided in section g, "statutory authorities for this proceeding," exceptions can

⁴ 63 Fed. Reg. at 3281-82; *Oldenburg, supra* note 3.

be made even though a voluntary standard is available. Although two exceptions exist, only one is necessary in order for the Commission to act. The exception that “it is unlikely that there will be substantial compliance with such voluntary standards” is applicable in this case.⁵

There has not been substantial compliance with the voluntary standards despite what the bunk bed manufacturing industry may claim. The term “substantial compliance” as indicated in the legislative history of the CPSA indicates that such compliance would provide for the elimination or reduction of the risks associated with the product involved. In the case of bunk beds, the risks involved resulting in numerous fatalities and thousands of injuries have definitely not been eliminated nor adequately reduced. Based on this simple logic alone, substantial compliance has not been achieved.

Moreover, the concept of adequate reduction has been generally defined as to the extent that there will no longer exist an unreasonable risk of injury. The sheer numbers and statistics of fatalities and injuries show once again that there still is an unreasonable risk. Also, children dying because of suffocation and becoming embedded is unreasonable in light of today’s technology and information distribution systems.

Additionally, under the available legislative history, compliance is to be viewed in terms of the number of complying products, not just manufacturers.⁶ Therefore, despite the statistic that ninety percent of manufacturers are in compliance, the focus should be on the products.⁷ As indicated by the number of recalls, approximately 500,000 in the past three to four years, the number of complying products is comparatively low. A rough estimate based on the Commission’s statistics (number of recalls compared to the number sold) indicates that approximately one-quarter to one-third of the beds sold in the last few

⁵ Id. at 3284.

⁶ Id.

⁷ See Janet Sloan, How Do Bunk Beds Stack Up?, Dallas Morning News, Feb. 13, 1998, at 1G.

years did not comply with necessary safety guidelines. These numbers do not constitute substantial compliance by those in the bunk bed industry and dictate that additional action needs to be taken by the Commission.

Action under the Consumer Product Safety Act

One avenue for implementing proper bunk bed safety regulations could be the Consumer Product Safety Act (CPSA). This statutory scheme would provide for more thorough protection and would be more practical in its application than other possible options.

The CPSA states that “a risk of injury which is associated with a consumer product and which could be eliminated or reduced to a sufficient extent [through other statutes] may be regulated . . . if the Commission by rules finds that it is in the public interest to regulate such risk of injury. . . .”⁸ First, this statutory provision is technically applicable. Under the statute’s definition section, bunk beds qualify as “consumer products” as they are for sale to a consumer for household use.⁹ Secondly, the “risk of injury” as stated and further defined in the statute includes the risk of death and personal injury. Certainly the fatalities and injuries associated with bunk beds fall into this category.

Furthermore, the Commission should find that it is in the public’s interest to regulate such risks of injury for several reasons. First, without mandatory guidelines, people, particularly children, are being killed and injured. Second, bunk bed manufacturers have not taken steps to ensure adequate protections as they assume they have no legal duty to do so. Third, the public’s perception of the purpose of government regulation is to protect people when their own ability to do so is limited. In this case, people have proven that they are unable to adequately protect themselves. Finally, regulation is in the public’s

⁸ 15 U.S.C.A. § 2079(d)(1998).

⁹ 15 U.S.C.A. § 2052(a)(1)(1998).

interest so that uniform regulations may be established. Currently, state legislatures such as Oklahoma are considering legislation to address the safety concerns associated with bunk beds.¹⁰ In order for all people to be protected alike, federal uniform guidelines that would preempt state action is ideal for these consumer products. Additionally, manufacturers should favor one set of guidelines to follow instead of having to note varying standards when manufacturing or retailing in a particular state.

Not only is the CPSA an appropriate statute for regulating bunk beds but it should be the preferred one as well. Action under the CPSA will provide for greater protection as it will encompass both children and adult size bunk beds. Comprehensive coverage under the CPSA is a practical determination as well. This would ensure that all bunk beds are subject to the same guidelines, definitions, and enforcement mechanisms. Additionally, it is crucial that both adult and children's bunk beds are able to be regulated as many parents may choose to purchase adult beds for their children for long term economical, practical, and longevity considerations.

Education and Awareness Campaign

If mandatory guidelines are implemented, reductions in bunk bed incidents should dramatically decrease. Additional measures, however, are still necessary to ensure adequate protection. One way to "fill the gaps" in the regulation, is to create and implement a wide scale education and awareness campaign. Not only should the Commission make safety information available to the public, but the bunk bed manufacturers and related industries should be made to participate as well. This campaign, in particular, should target the parents of younger children. Such a campaign would ideally include:

¹⁰ See Henry Gilgoff, Regulating Bunk Beds, Newsday, Mar. 1, 1998, at F8.

- information booklets, describing potential injuries and how to prevent them as well as how to properly set up a bunk bed, that would be distributed with all bunk beds sold, to all current bunk bed owners, and to educational and day care institutions especially with children under the age of six (ages where bunk bed incident rates are the most severe);
- information displays at all **places** of bunk beds retail sales;
- information telephone hot-lines provided by each manufacturer to assist with any specific questions regarding their particular bunk style or features and a specific hot-line established by the CPSC for general safety concerns; and
- use of all available media and **internet** resources to highlight bunk bed safety practices and other corresponding safety tips.

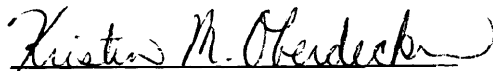
An education campaign is also necessary to help address and prevent bunk bed injuries resulting from falls and hangings (often resulting in strangulation) which is unfortunately omitted in the **mandatory** guidelines. Such a campaign is also recommended in light of labeling considerations and the fact that many people are not adequately informed just by the addition of a label on a product. Another troublesome area that could be addressed through awareness and education is all those bunk beds that are hand-made or home-made.

Conclusion

Now is the time for the Commission to at the very least establish mandatory guidelines in order to help ensure bunk bed safety. The current system has proven to be inadequate in addressing bunk bed safety issues and protecting children. Not only is it a good idea that mandatory guidelines be implemented but there is already adequate

statutory authority to so under the CPSA. The benefits provided from such guidelines, especially to children, compounded with an effective education and awareness campaign are certain to outweigh any potential material costs. Thus this safety issue and the concerns expressed within this comment period deserve this Commission's serious attention and commitment.

Respectfully submitted,

A handwritten signature in cursive script, reading "Kristin M. Oberdecker", written in dark ink.

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